FILE COPY

No. 790

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950

ALUMINUM COMPANY OF AMERICA,
Petitioner,

vs.

SAM H. LOVEDAY et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division has not been published, and it, along with Judgments of the District Court granting the motions for new trials are

set forth in the appendix of petitioner. The opinion of the United States Court of Appeals for the Sixth Circuit has not been published and is set forth in the appendix of petitioner. Any reference herein to the opinions and judgments of the District Court and the Court of Appeals shall be to the appendix to petitioner's brief.

JURISDICTION.

Judgment of the Court of Appeals was entered on December 31, 1959. The jurisdiction of this Court is invoked under the provisions of **28 U. S. C. A., Sec. 1254 (1).**

STATUTES INVOLVED.

1. 28 U. S. C. A., Sec. 1291 is set forth in the appendix hereto p. 11.

2. 28 U. S. C. A., Sec. 1651 (a) is set forth in the appendix hereto p. 11.

QUESTIONS PRESENTED FOR REVIEW.

1. Is an order of a District Court, which grants a new trial upon affidavits and testimony of jurors disclosing the misconduct of a juror outside the jury room and the introduction by said juror of such extraneous matter into the jury's deliberations, subject to review by an Appellate Court prior to a re-trial?

2. Does the United States District Court have authority (or jurisdiction) to consider the affidavits and testimony of jurors disclosing misconduct by a member of the jury outside the jury room and disclosing that the juror injected extraneous material, so obtained, into the deliberations?

STATEMENT OF CASE.

The Petitioner, Aluminum Company of America, is a Pennsylvania corporation and operates a smelting plant for the reduction of aluminum at Alcoa in Blount County, Tennessee. The respondents are citizens and residents of Blount County, Tennessee, and individually own or operate farms in Blount County.

The respondents instituted suit in the United States District Court for the Eastern District of Tennessee, Northern Division, seeking to recover damages to their lands, crops, and livestock occasioned by the emission of noxious gases in the operation of petitioner's reduction plant.

Seventy-five separate claims were jointly initiated in the District Court. Final disposition has been made of all claims except fifteen. The respondents in these fifteen actions were granted new trials because E. E. Hartman, one of the jurors, twice visited the area involved during the course of the trial and reported of his observations to the remaining jurors (A. 15a).

On one of his visits to the critical area, the recalcitrant juror slowed his automobile to observe cattle near the petitioner's north plant; and he reported to his fellow jurors that he had never seen finer looking animals (R. 210a, 211a, 212a). Comments on his observations were made in the jury-room on various occasions, for the jurors interrogated overheard his statements at different times (R. 207a, 218a, 223a).

Motions for new trials were seasonably filed.

The misconduct of the juror, Hartman, was brought to the attention of the District Court by affidavits, and at

the hearing on the motions, oral evidence was adduced to show his misconduct.

Based upon the affidavits and upon the testimony adduced, new trials were granted the respondents herein. Petitioner sought a review by Appeal coupled in the alternative with a petition for a Writ of Certiorari. The Appeal was dismissed and the Writ of Certiorari denied by the United States Court of Appeals for the Sixth Circuit. This petition results.

ARGUMENT.

POINT I.

The Order Granting New Trials Is Not a Final Decision Subject to Review.

Petitioner seeks a review of the allowance of new trials to the respondents. Such review is premature.

With certain exceptions not here material, **28 U. S. C. A., Section 1291,** grants the courts of appeals jurisdiction to review **only final decisions. Baltimore Contractors, Inc. v. Bodinger, 348 U. S. 176, 99 L. Ed. 233, 75 S. Ct. 249; Cohen, Exrx v. Beneficial Industrial Loan Corp., 337 U. S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221.**

In **Cobbledick v. United States, 309 U. S. 323, 84 L. Ed., 783, 60 S. Ct. 540,** this Court said:

> "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piece-meal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration."

A decision is **final** for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined. **St. Louis, I. M & S. R. Co. v. Southern Exp.**

Co., 108 U. S. 24, 28, 27 L. Ed. 638, 639, 2 S. Ct. 6; United States v. Pile, 130 U. S. 280, 283, 32 L. Ed. 904, 905, 9 S. Ct. 523; Heike v. United States, 217 U. S. 423, 429, 54 L. Ed. 821, 824, 30 S. Ct. 539; Berman v. United States, 302 U. S. 211, 82 L. Ed. 204, 58 S. Ct. 164.

An order granting a new trial is not a final decision within the meaning of **28 U. S. C. A., Sec. 1291**, and therefore is not subject to review, for the allowance of a new trial sets aside the final judgment and there is no existing judgment from which an appeal can be taken. **Ford Motor Co. v. Busam Motor Sales, Inc. (C. A. 6), 185 F. 2nd 531; Frank Mercantile Corporation et al. v. Prudential Ins. Co. of America (C. C. A. 3, 1940), 115 F. 2nd 496; Libby McNeill & Libby v. Malmskold (C. C. A. 9, 1940), 115 F. 2nd 786.**

Admittedly, after final judgment, the action on a motion for new trial may be reviewed for an abuse of discretion by the trial court. **Felton v. Spiro (C. C. A. 6, 1897), 78 F. 576**; however, at this stage no appeal lies from the order.

The courts have uniformly refused to entertain an appeal from an order on a new trial except in two instances:

(1) Where the Court had no jurisdiction to grant the motion because not timely filed or considered. **Phillips v. Negley, 117 U. S. 665, 29 L. Ed. 1013; Bailey v. Slentz et al. (C. A. 10), 189 F. 2nd 406; Jackson v. Wilson Trucking Corp. (C. A. D. C.), 243 F. 2nd 212; Freid v. McGrath (C. A. D. C.), 133 F. 2nd 350.**

(2) Where the Court refused to exercise its discretion and consider the motion. **Felton v. Spiro (C. C. A. 6, 1897), 78 F. 576; Dwyer v. United States (C. C. A. 9, 1909), 170 F. 160.**

Respondents not only urge that the order under consideration is not appealable but also that it may not be reviewed by virtue of **28 U. S. C. A. 1651 (a)**, which is known as the "All Writs Statute."

It has been observed by the courts of appeals that the "All Writs Statute" does not grant the appellate court a roving commission to supervise the administration of justice in the district courts and review by writs any unappealable order which it believes should be reviewed in the interest of justice. **In re Sylvania Electric Products, Inc. (C. A. 1, 1955), 220 F. 2nd 423; In re Josephson (C. A. 1, 1954), 218 F. 2nd 174; Southern Railway Company v. Madden (C. A. 4, 1955), 224 F. 2nd 320.**

In **Roche, U. S. District Judge et al. v. Evaporated Milk Assn. et al., 319 U. S. 21, 87 L. Ed. 1185, 63 S. Ct. 938**, this Court noted (p. 29):

> "Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid these conditions and thwart the congressional policy against piecemeal appeals in criminal cases. Cobbledeck v. U. S., 309 U. S. 323, 60 S. Ct. 540, 84 L. Ed. 783. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a plain evasion of the Congressional enactment that only final judgments be brought up for appellate review."

Accordingly, the petitioner is not entitled to a review of the order granting new trials to the respondents.

POINT II.

The District Court Had Jurisdiction to Grant New Trials on the Evidence of Jurors.

Jurisdiction relates to the controversy, the subject matter, and the parties; and it includes the power to err. **Pope v. United States, 323 U. S. 1, 89 L. Ed. 3, 65 S. Ct. 16; Fauntleroy v. Lum, 210 U. S. 230, 52 L. Ed. 1039, 28 S. Ct. 641; Burnet v. Desmormes Y. Alvorez, 226 U. S. 145, 57 L. Ed. 159, 33 S. Ct. 63**; and even were it conceded that the grounds advanced for a new trial were not well founded, it could only be said that the Court erred and not that it had no jurisdiction to consider the affidavits and testimony in support of the motion.

It is well recognized that even though jurors may not impeach their verdict, the testimony of jurors may be considered to disclose the introduction of extraneous matters into the jury's deliberation.

In **Mattox v. United States (1892), 146 U. S. 140, 36 L. Ed. 917, 13 S. Ct. 50**, this Court said:

> "There is, however, a recognized distinction between what may and may not be established by the testimony of jurors to set aside a verdict.
>
> . . . . . .
>
> "'. . . a juryman may testify to any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial.' See also Ritchie v. Holbrooks, 7 Serg. and R. 458; Denn. v. Driver, 1 N. J. L. 166; Nelms v. State, 13 Smedes & M. 500;

Hawkins v. New Orleans P. & Pub. Co., 29 L. Ann. 134, 140; Whitney v. Whitman, 5 Mass. 405; Hix v. Drury, 5 Pick. 296. We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority."

See also **Stone v. United States (C. C. A. 6, 1940), 113 F. 2nd 70**; and **City of Amarillo, Texas, v. Emery et al. (C. C. A. 5, 1934), 69 F. 2nd 626.**

In **Southern Pacific Co. v. Klinge (C. C. A. 10, 1933), 65 F. 2nd 85**, the Court said:

". . . if it is charged that a juror's conclusion was arrived at, not from the evidence, but as the result of bribery, or from the consideration of evidence or matters not a part of the trial proceedings, but brought in from the outside, such a charge can be and must be explored, and the testimony of a juror is competent in determining the existence of the fact."

Petitioner would make light of the impact which the recreant juror's observation had upon him and would infer that new trials were granted solely because he reported his impressions to the remaining jurors; but such is not the case.

The opinion of the District Court (A. 11a) and the order entered thereon (A. 15a) clearly show that new trials were allowed because of the juror's misconduct in visting the area as well as his misconduct in relating his impressions to the remaining jurors. Clearly the juror's observations impressed him, for he told three jurors about the cattle observed on three different occasions (R. 207a, 218a, 223a). Certainly this indicates that **his thinking** had been influenced by his observations, and it indicates that he was endeavoring to influence his fellow jurors.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

28 U. S. C. A. 1291 provides:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U. S. C. A. 1651a provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.